

Before the  
**Federal Communications Commission**  
**Washington, D.C. 20554**

**RECEIVED**

JUL 18 2005

Federal Communications Commission  
Office of Secretary

In the Matter of

Amendment of Section 73.202(b),  
FM Table of Allotments, FM Broadcast Stations  
(Elberton and Union Point, Georgia)

)  
)  
) MB Docket No. 05-191  
) RM-11243

**DOCKET FILE COPY ORIGINAL**

To: Marlene Dortch, Secretary  
Attn: Audio Division, Media Bureau

**COMMENTS OF FRANK G. MCCOY**

Frank G. McCoy ("McCoy"), by his attorney, hereby respectfully submits the following Comments in opposition to the rule changes proposed in this proceeding.

1. This proceeding involves a Petition for Rulemaking filed by Georgia-Carolina Radiobroadcasting Company, LLC ("Georgia-Carolina"), the licensee of FM Broadcast Station WEHR, Channel 286A, Elberton, Georgia. Petitioner proposes to upgrade Channel 286A to Channel 286C2, to re-allot Channel 286C2 to Union Point, Georgia and to have its Station WEHR license modified to specify Union Point as its community of license.

2. Commission records<sup>1</sup> show that Georgia-Carolina is a company controlled by Douglas M. Sutton, Jr. ("Mr. Sutton" or "Sutton"). Mr. Sutton has a past record, which suggests that he cannot be relied upon to follow through with the changes proposed in this proceeding, even if the Commission grants all of the relief requested in the Petition for Rulemaking.

3. On July 14, 2000, the Commission acted favorably on a Notice of Proposed Rulemaking, filed by Radio Elberton, Inc. ("REI"), another company owned and/or controlled by

<sup>1</sup> Ownership Report, File No. BOA-20031124ADO.

No. of Copies rec'd. 045  
List ABCDE

Douglas M. Sutton, Jr. By *Report and Order*, published at 15 FCC Rcd 12,751 (Allocations Branch, 2000) and effective on August 22, 2000, the Commission reallocated Channel 221 from Elberton, Georgia to Lavonia, Georgia and modified the license of Station WWRK-FM<sup>2</sup> to specify operation at Lavonia, Georgia. The Commission's *Order* directed that an application to implement the change be filed within ninety (90) days of the effective date of the *Order*, i.e., on or before November 20, 2000. Mr. Sutton, however, did not file an implementing application within the time specified in the *Order*. Instead, he sat on his hands, warehousing the frequencies involved in the change. An implementing application (File No. BPH-20040901ADN) was not, in fact, filed until September 1, 2004, more than four years after the Commission released its *Order*, directing the filing of that application.

4. The Commission's *Notice of Proposed Rulemaking* in the Elberton and Lavonia proceeding ("*NPRM*") was published at 14 FCC Rcd 21,139 (Allocations Branch, 1999). As described in the *NPRM*, REI argued forcefully in support of its proposal to move its station from Elberton to Lavonia. It promised that if the FCC would grant the requested relief, REI would apply for the Lavonia facilities (*NPRM* at para. 1). It stated that Lavonia was an incorporated community with a population of 1,840 persons and had businesses, churches, clubs and other characteristics of communities that already had radio allotments. Elberton, with a population of 5,682 people, presently received local aural service from two FM stations, WWRK-FM and WEHR, Channel 286A, as well as AM Station WSGC. Therefore, REI stated that the allotment of Channel 221A to Lavonia would fulfill the highest allotment priority since there was virtually no populated area without any reception service (*NPRM* at para. 2).

---

<sup>2</sup> Call letters subsequently changed to WSGC-FM.

5. Petitioner stated that the re-allotment would also enable Station WWRK-FM to operate as a 6 kW Class A station instead of its present 3 kW limitation. Thus, it submitted that the re-allotment of Channel 221A from Elberton to Lavonia would enable Station WWRK-FM to provide service to 60,810 persons within a 2511 square mile area, an increase of 183 percent from its present 21,488 persons within a 1732 square mile area. According to the petitioner, all of the people within the station's reception area would lose service because there was no overlap of the present and proposed 60 dBu contours. However, it stated that the entire loss area would continue to be well-served by five or more aural services. Finally, petitioner stated that Lavonia was not located within any Urbanized Area (*NPRM* at para. 3).

6. On July 14, 2000, the FCC's Allocations Branch released a Report and Order ("*R&O*"), effective August 28, 2000, adopting REI's proposal. In re *Elberton and Lavonia, Georgia*, 15 FCC Rcd 12751 (Alloc. Br. 2000). In doing so, however, the Allocations Branch was obliged to deny a conflicting application by Waves of Mercy Productions, Inc., for a construction permit for a new non-commercial educational FM station at Pendergrass, Georgia (*R&O* at para. 4). The Allocations Branch compared the communities of Pendergrass and Lavonia. It found that Lavonia had a population approximately six times that of Pendergrass. It found that, although Pendergrass had some of the attributes associated with being a community for allotment purposes, such as a library, several restaurants, and a post office, staff research showed that one of the two zip codes (30575) assigned to Pendergrass actually reflected a Tolmo post office, while the other zip code (30567) was attributed with serving 1956 people, thus reflecting its use as more than a city post office (*R&O* at para. 4). Further, according to the 1990 U.S. Census, of the 138 workers over 16 years of age residing in Pendergrass, only 20 worked in Pendergrass and 118 worked outside of the community. This same U.S. Census data showed that

of the 547 workers over 16 years of age residing in Lavonia, 384 people worked within the community (*R&O* at para. 4). In addition, Lavonia had its own city government, city hall, fire department, city maintenance department, elementary school, numerous restaurants, churches, banks and several retail stores (*R&O* at para. 4). Therefore, the staff found that, consistent with Commission precedent, Lavonia was to be preferred on its larger population for a first local aural service. Citing, *Powhatan and Goochland, Virginia, supra*, *Obion and Tiptonville, Tennessee*, 7 FCC Rcd 2644 (1992), and *West Liberty and Richwood, Ohio*, 6 FCC Rcd 6084 (1991). The *R&O* was published in the Federal Register on July 25, 2000, at 65 F.R. 45723. Thus, the rule change became final and the conflicting Pendergrass application was effectively denied because of REI's representations to the FCC - - representations which later turned out to be false.

7. Thus, Sutton effectively committed a fraud on the Commission and, as a result of that fraud, the *Pendergrass* application was denied and Sutton was enabled to "warehouse" the frequencies involved for more than four years. Given that past record of defiance of an FCC order, intended to benefit him, Sutton cannot be relied upon to implement any order in this proceeding, benefiting his company.

8. In a different context, the Commission has remarked that it will not waste scarce resources on rulemakings where it cannot be assured that those rulemakings can actually be implemented. In a case involving the "Inconsistent Application Rule," the Commission observed that:

"To accept Big Wyoming's argument and allow applicants to amend their proposals to remove inconsistencies would totally undermine the inconsistent application rule which is designed 'to avoid the waste of Commission resources, prejudice to other applicants, and delay of service to the public which arises when the Commission must process applications by the same person or entity, not all of which

can be granted. *Valley Broadcasting Co., (KVBC-TV)*, 58 RR 2d 945 (1985). Big Wyoming's argument that the subsequent amendment purportedly rendered its Rock Springs application grantable ignores the fact that Commission resources had already been wasted in processing their original Rock Springs application which was not grantable. The mere fact that the amendment may cure the overlap does not justify reprocessing of their application which would necessitate a second engineering study."

Big Wyoming Broadcasting Corporation, 2 FCC Rcd 3493 (1987).

9. In this case, we have a Petitioner who has already defied one Commission order to implement a rulemaking and simply warehoused the frequencies involved for more than four years. Mr. Sutton cannot, therefore, be relied upon to promptly implement any decision in his favor in this proceeding. That being so, scarce Commission resources cannot be diverted to the processing of Sutton's proposal. Instead, the proceeding should be terminated without making the rule changes that he proposes.

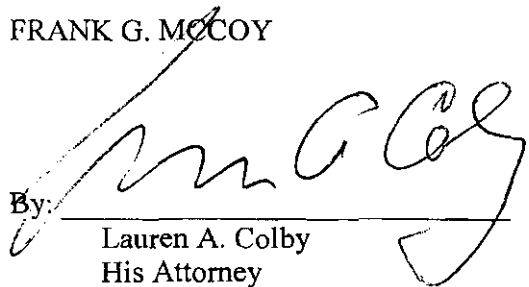
Respectfully submitted,

FRANK G. MCCOY

July 18, 2005

Law Office of  
LAUREN A. COLBY  
10 E. Fourth Street  
P.O. Box 113  
Frederick, MD 21705-0113

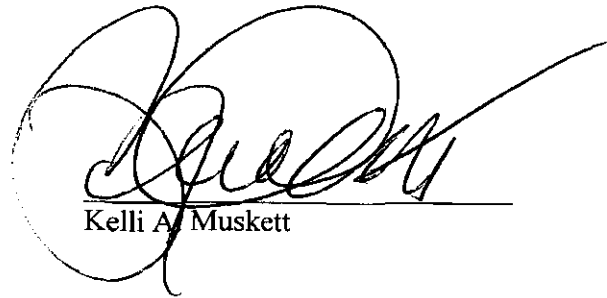
By

  
Lauren A. Colby  
His Attorney

### CERTIFICATE OF SERVICE

I, Kelli A. Muskett, a secretary in the law office of Lauren A. Colby, do hereby certify that copies of the foregoing have been sent this 18th day of July, 2005, via first class, U.S. mail, postage prepaid, to the offices of the following:

Dan J. Alpert, Esquire  
Law Offices of Dan J. Alpert  
2120 North 21<sup>st</sup> Road  
Arlington, Virginia 22201



Kelli A. Muskett